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No. 81-2110

IN THE

Supreme Court of the United States

October Term, 1983

UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY,

Appellant

v.

MAYOR AND COUNCIL OF THE CITY OF CAMDEN and THE DEPARTMENT OF TREASURY OF THE STATE OF NEW JERSEY,

Appellees

BRIEF OF APPELLEES

On Appeal from the Supreme Court of New Jersey

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QUESTIONS PRESENTED

1. Whether appellant's challenge to provisions of a Camden ordinance has become moot because of amendments which took effect after the Court noted probable jurisdiction.

2. Whether this case fails to present a justiciable case or controversy because there has been no fact finding procedure or adjudication of facts, and no proof of injury.

3. Whether a city ordinance which requires good faith efforts to hire qualified city residents for 40 percent of the jobs on city-funded construction projects, while allowing non-city residents to obtain 60 percent of the jobs created by the City's own construction money, violates the Privileges and Immunities Clause where the enacting city is suffering from an extraordinary rate of unemployment, a precipitous decline in businesses and the jobs they provide, a steep reduction in population, and a disproportionately high rate of unemployment among members of minority groups who comprise more than 70 percent of the city population and have suffered extensive discrimination in the industry affected by the city's law.

4. Whether the ordinance described in Question 3 above violates the Equal Protection Clause when it defines a resident merely as a person who resides in the city, and has no durational requirement for residency.

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OPINION BELOW

The opinion of the Supreme Court of New Jersey, dated February 18, 1982, is reported at 88 N.J. 317, 443 A.2d 148 (1982) and appears in the Appendix to appellant's Jurisdictional Statement at A1-A32.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on February 18, 1982. Notice of Appeal and a Jurisdictional Statement were filed within ninety (90) days of that date. Probable jurisdiction was noted on March 7, 1983, ____ U.S. ____, 103 S. Ct. 1270 (1983). This Court's jurisdiction is invoked by appellant under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

United States Constitution, Article I, §8, Cl 3:

> "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ."

United States Constitution, Article IV, §2, Cl. 1:

> "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."

United States Constitution, Fourteenth Amendment, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The ordinance of the City of Camden whose constitutionality is at issue here was substantially changed by an amendment that took effect in July, 1983. The original ordinance is set forth in its entirety in the Joint Appendix for this matter at A36-A58. The entire amendment is set forth in Appellees' Appendix, A1-A-19. In relevant part, the amendment provides as follows:

Section 1. *Definitions*

Construction Contract—Any agreement for the erection, repair or alteration of any building structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant.

Resident of the City of Camden—any person who resides in the City of Camden.

STATEMENT OF THE CASE

1. *The Serious Economic and Social Dilemma Faced by Camden*

Until the 1960's the City of Camden was considered the political and social capital of southern New Jersey. For the last 15 years, however, Camden has been fighting a constant uphill battle against major problems caused by urban decay and economic decline. There has been very high unemployment, a heavy loss of population, and a dramatic reduction in the number of businesses located in Camden. These problems are graphically borne out by statistics.

The unemployment situation is stark. The New Jersey Department of Labor reports that overall unemployment, which stood at 6.3 percent of Camden's total population in 1970,[1] had increased to 19.1 percent by 1983.[2] Thus, almost one-fifth of Camden's total population is out of work.

Moreover, the Department's figures underestimate the situation because they do not include all persons looking for employment. More inclusive statistics compiled by the City of Camden's Employment and Training Office show that 30 percent of the overall adult population is unemployed, and so is 45 percent of the overall youth population.

Even the latter statistics do not give the full picture, however. Minority groups comprise over 70 percent of the population of Camden: Black Americans are 53 percent of the population, and Hispanic Americans are 19.2 percent.[3] These minority groups traditionally have a higher unemployment rate than the population as a whole. In 1977, for example, when *overall* unemployment in Camden was less than 10 percent, Black unemployment was 18.4 percent (or approximately double the overall rate) and Hispanic unemployment was 15.6 percent.[4] Thus, to-

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1. Source: 1970 — Office of Demographic and Economic Analysis, Bureau of Labor Force Statistics, Division of Planning and Research, New Jersey Department of Labor.

2. Source: 1982 — Office of Planning and Management, Division of Planning and Research, New Jersey Department of Labor.

3. Source: 1980 Census of Housing and Population, U.S. Department of Commerce, Bureau of the Census. Issue date — March, 1981.

4. Source: New Jersey Department of Labor, Affirmative Action Office.

day Black Americans and Hispanic Americans in Camden undoubtedly have a higher rate of unemployment than the figures reported by the Employment Office of 30 percent for the overall adult population and 45 percent for the overall youth population.

The statistics also show that, while unemployment was on the rise, the population was dramatically declining. Camden's population was 102,551 in 1970,[5] and only 84,910 in 1980.[6] This is a reduction of 17 percent, or almost one-fifth, in only 10 years.

There was also a startling loss in the number of businesses located in Camden. The city's Employment and Training Office recently conducted a survey of retail and service establishments in Camden. It found that whereas in 1967 there had been 1,049 retail stores in the city, in 1980 there were only 558 such stores — a reduction of almost 50 percent. In 1967 there had been 496 service-related businesses, but in 1980 there were only 139, a drop of more than two-thirds. (Because of the decline in businesses, there is only one remaining major supermarket and no movie theater in the City of Camden.)[7]

The rise in unemployment, reduction in population, and loss of businesses have had harmful corollary effects. There has been a serious decline in the city's tax base, an increase in the number of people on welfare, neighborhood deterioration, and wholesale abandonment of both commercial and residential properties.

2. *The Affirmative Action Ordinance Enacted by Camden in Response To Its Problems*

Faced with this barrage of problems, the City Council of Camden responded to its "legal and moral obligation"[8] to promote the welfare of the city's citizens. The Council enacted, and subsequently amended, an Affirmative Action ordinance provid-

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5. Source: 1970 U.S. Census, PAC (1)-159, table P-2, pp. 85-92, U.S. Department of Commerce, Bureau of the Census.

6. Source: 1980 Census of Housing and Population, U.S. Department of Commerce, Bureau of the Census. Issue date — March, 1981.

7. This is so despite the fact that Camden's population is over 84,000 people.

8. Camden Revised Ordinances — MC #1653, Preamble.

ing for minority group and city resident employment on city-funded construction projects.[9]

This ordinance was enacted and amended pursuant to a New Jersey statute.[10] The State statute provides a state-wide program for affirmative action in employment on public construction, but allows a city to adopt a substitute local program to be enforced by local officials. The local program becomes legally effective if approved by the New Jersey State Treasurer.[11]

The substitute local ordinance adopted and amended by Camden requires contractors to make good faith efforts to ensure that minorities comprise 25 percent of the work force in all trades employed on city construction projects exceeding $50,000, and to make good faith efforts to ensure that residents comprise 40 percent of the entire work force on these projects. The statute provides explicit criteria for measuring a contractor's good faith efforts, and establishes an Affirmative Action Review Council which assists and monitors contractors' efforts to meet the goals of the ordinance. If a contractor makes good faith but unavailing efforts to meet the minority and residency goals, he is in no way penalized or disqualified from working on the project.

As originally enacted, the ordinance defined a resident as one who had lived in the city for the previous 12 months. The amended ordinance eliminates this 12-month requirement; it defines a resident simply as "any person who resides" in Camden.[12]

The original ordinance also applied to "the development and construction of all residential housing of four units or more," although this was always interpreted to mean only residential rehabilitation projects funded by the City. Under the amended ordinance this "residential housing" provision was eliminated to

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9. The funds used by the city to pay for construction projects affected by the ordinance come from city taxes, from municipal bond issues and from federal grant monies possessed by the city.

10. The amendments by Camden City Council took effect in July, 1983, several months after the Court noted probable jurisdiction in this case.

11. *N.J.S.A.* 10:5-36(c).

12. Appellees' Appendix at A4.

make it explicitly clear that the ordinance applies only to city-funded projects.

3. *The State Procedures Under Which Camden's Ordinance Was Approved By The State Treasurer And Then Immediately Challenged In The State Appellate Courts By Appellant*

Pursuant to the New Jersey statute under which it was passed, the Camden ordinance went before the State Treasurer's Office for approval. The approval process entailed a brief, non-judicial administrative review of the ordinance to ensure that it at least meets the minimum minority hiring goals established by the State. The City Attorney and the State Treasurer's Office exchanged letters relating to provisions of the ordinance, but, aside from statistics on unemployment in Camden, no evidence relating to the ordinance was taken.

After the ordinance was approved by the Treasurer's Office, the appellant challenged the ordinance in the intermediate appellate court for the State of New Jersey (known as the Appellate Division of the New Jersey Superior Court). This challenge was the first time appellant had participated in the process of enacting or reviewing the ordinance. (Appellant had not appeared at a public hearing held by the City Council prior to final adoption of the ordinance, and had submitted nothing to the State Treasurer.)[13]

Appellant was able to file a challenge in the state appellate courts because of unique local rules governing those courts.[14] When there has been an administrative review of the type held here by the Treasurer's Office, the local rules permit an appellate case to be filed though there was no prior adjudicatory proceedings, and no prior fact-finding procedure, before any court or agency, and though the person filing the appeal was not a party to any previous proceedings of any sort. Thus, the appeal in this case was filed without an adjudicatory record below.

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13. Other groups—e.g., an Affirmative Action Coalition—did meet with and submit information to the Treasurer's Office.

14. N.J.R. App. Pro. 2:5-6(a)

without any judicial findings of fact, and with no evidence on any subject other than some statistics on unemployment in Camden.

After appellant's appeal was filed in but before it was decided by the intermediate appellate court, the Supreme Court of New Jersey certified the appeal for immediate review in the State's high court.

4. *The Opinion Of The New Jersey Supreme Court*

In the state supreme court, the appellant challenged the 25 percent minority hiring percentage and the residential hiring provision of the Camden ordinance. However, the court below unanimously upheld the ordinance.

In regard to minority hiring, the court found that similar hiring requirements had been approved by federal courts in past cases. It ruled that this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), "la[id] to rest any doubts about the validity under the United States Constitution of state-imposed Affirmative Action requirements."[15]

The court further held that "the states have no less constitutional authority than the federal government to remedy identified past discrimination" (A15), and that the New Jersey statute under which the Camden ordinance was enacted was an effort to remedy such discrimination in the construction industry. Finally, the court pointed out that contractors were not required "to hire non-qualified employees or to disregard meaningful differences in employee qualifications."[16]

In connection with the residential hiring provision, the court initially said that due to the high percentage of minority residents in the City of Camden, "a duty to hire Camden residents could only increase the likelihood" that minority hiring goals would be met.[17] In subsequent sections of its opinion, the court upheld the provision against attack based on the Interstate

15. A15.

16. A19. Appellant has not challenged the minority hiring provision in this Court. Rather, it has acceded to the decision of the New Jersey Supreme Court on this subject.

17. A12.

Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause.

With regard to the Commerce Clause, the court noted that "[i]t is not the purpose of the United States Constitution to stifle the legitimate attempts of state and local governments to deal effectively with their local ills,"[18] ills such as "the severe economic plight that has befallen the City of Camden."[19] Relying on this Court's leading decisions in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), the New Jersey court held the residential hiring provision permissible because the "City of Camden is not regulating the flow of commerce between private parties. The city is acting in the role of market *participant*, not market *regulator*." (Emphasis in original.)[20] This was "crucial" because this Court has determined that " '[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.' *Hughes v. Alexandria Scrap Corp., supra*, 426 U.S. at 810 (footnotes omitted)." A22.

Turning to the Privileges and Immunities Clause, the court below, quoting decisions of this Court, ruled that "[t]he purpose of the Privileges and Immunities Clause is to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[21] This "equal footing" purpose was not transgressed here because, far from imposing a particular disadvantage upon citizens of other states, the ordinance "most certainly affects more New Jersey residents not living in Camden than it does out-of-state residents."[22]

Finally, the court rejected the argument that the residency provision violated the Equal Protection Clause. The court noted that residency provisions "for municipal employees have almost

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18. A12.

19. *Ibid.*

20. A22.

21. A26, quoting *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), quoting *Paul v. Virginia*, 8 Wall 168, 180 (1869).

22. A26.

universally been upheld under the Equal Protection Clause as a rational means of furthering the city's public welfare."[23] It continued by holding that "[t]he rational reasons for a city's decision to hire its own residents in direct employment . . . apply just as forcefully in the context of city contracting for public works projects. The severe unemployment in Camden and the need for economic revitalization further support the rationality of resident hiring quotas."[24]

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23. A26.
24. A28.

SUMMARY OF ARGUMENT

I

This Court is constitutionally limited to deciding "cases or controversies." There are also prudential limitations upon the Court's jurisdiction. The constitutional and prudential limits on jurisdiction ensure the presence of prerequisites to effective litigation. In this case the limitations on jurisdiction are violated, and the prerequisites to effective litigation are absent.

A. The case has largely become moot because of recent amendments to the provisions of the ordinance challenged by appellant. The amendments, which became effective after probable jurisdiction was noted, eliminated a 12-month durational residency requirement, and provided instead that a resident is simply any person who lives in Camden. The amendments also eliminated any reference to residential construction, in order to make explicitly clear that the ordinance is intended to apply only to construction funded by city monies. Thus, basic statutory conditions existing when probable jurisdiction was noted no longer obtain, and much of the argument made by appellant is no longer relevant. The Court may therefore wish to dismiss the case as moot.

B. The case is not ripe for review and presents the Court with a request for an advisory opinion. There has been no trial-type hearing before any court or agency, and no adjudication of facts. Appellant's allegations therefore present only hypothetical facts and conjectural conclusions rather than a concrete claim based upon proven facts.

The absence of a trial-type hearing, and the concomitant lack of adjudicated facts, are of special importance here and cause this case to be inappropriate for decision by this Court. Had there been a trial, Camden would have shown as a factual matter that the movement of businesses and employees to the suburbs is a major reason for the economic decline and high rate of unemployment in the city. Camden would also have shown that the ordinance has had a favorable impact upon these problems. Finally, appellant would have had to factually substantiate

its claim that the ordinance has caused out-of-city residents to be injured by losing jobs they otherwise would have obtained. The city believes this claim is factually untrue and would have rebutted it at trial.

C. Appellant lacks standing to bring this case. It has shown no proof of any injury at all, let alone injury traceable to the ordinance. The city, moreover, believes appellant *cannot* show injury to itself or members of its constituent unions.

II

A. Appellant originally claimed the Camden ordinance violated both the Interstate Commerce Clause and the Privileges and Immunities Clause. After its Interstate Commerce argument was rejected by this Court in *White v. Massachusetts Council of Construction Employers, Inc.*, __ U.S. __, 103 S.Ct. 1042 (1983), appellant formally withdrew it, and now purports to rely solely on its Privileges and Immunities claim. In fact, however, its Privileges and Immunities argument is suffused with claims normally made under the Interstate Commerce Clause, and is really an Interstate Commerce argument disguised as a Privileges and Immunities argument. If its argument were accepted, it would nullify the *White* opinion within a year of its issuance.

The *White* decision precludes such nullification. The Court there said that a residency provision is valid under the Privileges and Immunities Clause if it does not regulate all who benefit in some way from the economic ripple effect of a city project, but instead governs only those who work on a "class of economic activities in which the city is a major participant." The Camden law governs only such parties.

B. The Camden ordinance is a constitutionally permissible means of responding to dramatic city problems. It is a reasonable effort to increase employment for city residents on city-funded projects, while simultaneously permitting non-residents to obtain more than half the jobs on those projects. The law operates in an area where the city has plenary authority and control — the expenditure of its own funds for construction.

Moreover, the ordinance is in harmony with decisions of Congress and this Court. Congress has enacted, and the Court has upheld, laws providing funds for public works and directing that a percentage of the money should be set aside for minority-owned businesses. Congress' objectives were to channel funds into areas of high unemployment and to direct funds into the minority community, which otherwise would not benefit from public works programs because of extensive racial discrimination in the construction industry. The Camden ordinance as a whole, and the residency provision in particular, have the same objectives and address the same problems.

C. Appellant's arguments that the residency provision of the ordinance violates the Privileges and Immunities Clause are invalid.

1. Appellant asserts that the ordinance is illegal because unemployment is a "national problem." That unemployment exists elsewhere, however, does not preclude Camden from seeking to alleviate its own dramatic local unemployment situation by determining that a portion of its own money should go to its own residents. This is only the more true because the Camden law provides a necessary local supplement in a geographical area where congressional programs to lessen unemployment have had an inadequate impact, and because in enacting the law Camden was fulfilling the Brandeisian function of serving as a "laboratory" for the development of new programs to solve serious economic and social problems.

2. Appellant argues that parties located outside of Camden are not the "peculiar source of the evil" addressed by the ordinance, and that the law is not substantially related to alleviating the evil. Its argument is factually incorrect and would have been shown incorrect at a trial.

The high rate of unemployment in Camden is due to the flight of employed individuals and businesses to the suburbs. This flight left behind a reduced population with a high percentage of unemployed, as well as greatly diminished job opportunities. Moreover, prior to the ordinance, jobs on city construction projects were mainly filled with non-residents. For

these reasons parties now outside the city *are* the source of the evil confronting it. The ordinance directly addresses the evil, and has had a favorable impact upon it, by requiring good faith efforts to hire city residents for construction funded by the city.

3. Appellant claims the ordinance excludes members of its constituent unions from 40 percent of the jobs Camden itself has created. In fact, however, the law has not excluded any non-city resident from any job he otherwise would have obtained. The alleged "exclusion" has not excluded, and appellant has not shown anything to the contrary.

4. Appellant conjectures that the ordinance will lead other jurisdictions to enact retaliatory laws. However, there is no evidence that laws have been enacted in retaliation and no sign that they will be. Appellant's speculation cannot deprive Camden of the right to enact a law to meet a problem which is concrete rather than speculative.

5. Appellant claims the ordinance violates the principle that state citizenship cannot be the basis for discrimination, i.e., the principle that a citizen of State A must receive in State B the same privileges which accrue to the latter's citizens by virtue of their state citizenship. The ordinance does not violate this principle. Even if Camden residents obtain a preference, they do not obtain it by virtue of being citizens of New Jersey, but because they are citizens of the city. Being a citizen of New Jersey entitles no one to any preference at all, and more non-Camden, New Jersey residents are affected by the ordinance than out-of-state residents. There is thus no discrimination against out-of-state residents. In fact, there is no discrimination against anybody, since the ordinance has caused no one to lose a job he otherwise would have obtained.

6. Finally, appellant says that because the state assertedly could not pass the law enacted by Camden, the city cannot do so either. But the state *could* pass a law providing for good faith efforts to hire city residents for 40 percent of the jobs on city-funded projects in a municipality faced with economic problems of the magnitude confronting Camden. All the reasons supporting Camden's law would support the state's law.

III

The Camden ordinance is valid under the Equal Protection Clause. Appellant's argument to the contrary is directed at the 12-month durational requirement which no longer exists. Appellant's argument is thus moot.

Simple bona fide residency requirements of the type presently contained in the ordinance have repeatedly been upheld by this Court. Such a requirement does not burden travel. As well, there is no fundamental right to employment on city-funded projects. Nor is any suspect classification involved. For these reasons, the ordinance must be upheld if it is a rational means of addressing a problem. The law is a highly rational means of alleviating severe economic ills experienced by Camden.

ARGUMENT

I. THE CONSTITUTIONAL AND PRUDENTIAL LIMITATIONS UPON THIS COURT'S JURISDICTION ARE VIOLATED HERE.

Under Article III of the Constitution, the jurisdiction of this Court is limited to the resolution of "cases or controversies." As well, the Court takes account of prudential limitations on the exercise of its jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1974). The constitutional and prudential limitations on the Court's authority are expressed in a number of doctrines. Thus, the Court will not decide a moot case. It will not issue an advisory opinion. It will not adjudicate a case unless the litigation is ripe for review. Nor will it decide a case brought by a party who lacks standing.

These constitutional and prudential doctrines ensure certain prerequisites to effective litigation. They ensure that a case will present concrete facts of record, rather than matters which are merely abstract or hypothetical.[25] Likewise, they ensure that questions will be real and immediate, not merely conjectural or speculative.[25a] Finally, they guarantee that a party seeking review has or will immediately suffer an actual injury that gives him a personal stake in the controversy.[26] Such injury conduces to the full illumination of issues.

In the present case, the foregoing doctrines which limit the Court's jurisdiction are all violated. As well, the prerequisites those doctrines are designed to ensure are absent.

A. The Present Case Has Largely Been Mooted By Recent Changes In The Ordinance Being Challenged.

When probable jurisdiction was noted, the ordinance contained a durational residency requirement: a resident was defined as a person who had resided in Camden for 12 months. A provision of the ordinance also provided that the law applied

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25. *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1946).

25a. *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (Brennan, J., concurring).

26. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

to residential construction of four or more units (though this was always interpreted to refer only to residential construction funded by the city). The briefs on the merits filed by appellant and *amicus* New England Legal Foundation are largely directed to the durational residency requirement and the residential construction provision. This is true both as to their Privileges and Immunities argument and their Equal Protection argument.

In the summer of 1983, however, the ordinance was amended.[27] There is no longer a durational residency requirement. The definition of residency was changed so that now a resident is simply any person who lives in Camden.[28] Also, all reference to residential construction has been eliminated to make explicitly clear that the ordinance is inapplicable to projects not funded by the city. Thus, basic conditions existing when probable jurisdiction was noted no longer obtain, and much of the argument of appellant and *amicus* is no longer relevant.

In these circumstances, a significant, indeed a predominant, portion of the case has been mooted. This Court may therefore wish to dismiss this case.

B. In Its Present Posture This Litigation Is Not Ripe For Review And Presents The Court With A Request For An Advisory Opinion.

Because of the peculiarities of New Jersey procedure, the Camden ordinance went directly from a non-adjudicatory, administrative review in the State Treasurer's office to the New Jersey appellate courts. This case has never been before a state trial court, nor has there been any trial-type administrative procedure. There has thus been no adjudication of facts in this litigation.

The absence of any trial-type hearing, and the concomitant lack of adjudicated facts, are of special importance here. Had there been a trial, the city would have shown as a factual matter

27. The amended ordinance appears in Appellees' Appendix at A1-A19.

28. The ordinance thus states that a "Resident of the City of Camden" is "any person who resides in the City of Camden." Appellees' Appendix at A4.

that the movement of businesses and their employees from the city to the suburbs was a major cause (i.e., a peculiar source) of the economic decline and loss of jobs in Camden. The city would also have shown that, by requiring good faith efforts to hire city residents, the ordinance has had a favorable impact upon the problem caused by businesses and employees who have left for the suburbs. Finally, at a trial the appellant would have had to factually substantiate its claim that out-of-city residents have been injured by a loss of jobs they otherwise would have obtained. The city alleges there has been no such injury, and, at a hearing, would introduce proof to rebut any such claim of harm.[29]

Thus, due to the lack of a prior trial-type hearing and adjudicated facts, this litigation is not meet for review by this Court. Appellant presents only hypothetical facts and conjectural conclusions rather than a concrete claim based upon proven facts. In this regard, the case is very much like another New Jersey proceeding which was adjudicated by the state supreme court but was not within the jurisdiction of this Court. *Doremus v. Board of Education*, 342 U.S. 429 (1951). In *Doremus* this Court pointed out that "no trial was held and we have no findings of fact." The Court further stated that no sufficient injury had been proven. *Id.* at 432. In the circumstances, the Court said that even though a state tribunal may render an advisory opinion, this Court cannot. "[B]ecause our own jurisdiction is cast in terms of "case or controversy," said the Court, "we cannot accept as the basis for review . . . any procedure which does not constitute such." *Id.* at 434.

Doremus is applicable here. Also applicable is the principle enunciated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1966), perhaps this Court's leading decision on ripeness. In *Ab-*

29. That the appellant and members of its unions have suffered no harm from the ordinance is the more true because the members can work on projects only if unionized contractors bid for and receive construction contracts. Here, however, unionized contractors have received only one of six contracts let for competitive bidding by the city. Nor has any union contractor ever claimed a failure to bid for or receive a contract was due to the residency requirement of the ordinance.

bott, the Court said the purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-149. In the present case, the Court is asked to entangle itself in abstraction and to interfere in a decision that has not caused concrete harm.[30]

C. Appellant's Lack of Proof of Injury Also Deprives It of Standing.

In order to have standing, appellant must show "not only a distinct and palpable injury" that has been suffered or is immediately threatened, *Warth v. Seldin, supra*, 422 U.S. at 501, but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1970). Appellant fails these tests because it has proven no concrete injury at all, let alone injury traceable to the ordinance.

Indeed, as said before, appellees believe appellant *cannot* prove injury to itself or to members of its unions. Six construction contracts have been awarded by Camden since the ordinance was enacted. On none of them did union members lose jobs because of the ordinance. Moreover, this experience indicates it is unlikely the ordinance will cause a loss of jobs by union members in the future. Thus, it is probable that appellant could not prove injury in a trial court. Certainly, then, its mere speculative allegations of injury are insufficient to confer standing.

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30. *International Longshoremen's Union v. Boyd*, 347 U.S. 222 (1954), is also applicable. In that case there was no evidence that the members of a union had suffered the sanctions they feared. The Court said: "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." 347 U.S. at 224.

II. THE CAMDEN ORDINANCE IS VALID UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. Much of the Appellant's Privileges and Immunities Argument Is, in Reality, An Interstate Commerce Clause Argument And Was Specifically Rejected By This Court In the Virtually Identical Case of *White v. Massachusetts Council of Construction Employers, Inc.*[31]

In its Jurisdictional Statement, appellant claimed the Camden residency provision violated the Interstate Commerce Clause. This Court, of course, has held that the Interstate Commerce Clause and the Privileges and Immunities Clause have a "mutually reinforcing relationship"[32] founded upon their common origin and purposes. Both clauses stem from the Fourth Article of the Articles of Confederation, and both promote a national economic unit.

The appellant's Interstate Commerce argument was rejected by this Court in *White v. Massachusetts Council of Construction Employers, Inc., supra*. The Court there ruled that the Interstate Commerce Clause was not violated by a Boston Executive Order requiring that 50 percent of the worker hours on city-funded construction projects must be put in by bona fide residents of Boston. The Boston Order and the Camden Ordinance are virtually identical.[33] Thus, because of the decision in *White*, appellant has now formally withdrawn its Interstate Commerce argument. Purportedly, it now relies solely on the Privileges and Immunities Clause.

However, appellant's brief, as well as the brief of *amicus* New England Legal Foundation, is suffused with arguments normally made under the Interstate Commerce Clause. Appellant and *amicus* thus repeatedly claim that Camden's ordinance

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31. ___ U.S. ___, 103 S.Ct. 1042 (1983).

32. *Hicklin v. Orbeck*, 437 U.S. 519, 531 (1978).

33. The only practical difference is that Boston requires that city residents perform a higher percentage of work than does Camden.

is protectionist, will lead to interstate rivalries and retaliation, and will cause Balkanization of the national economic unit. Much of their claims are, indeed, an Interstate Commerce Clause argument disguised as a Privileges and Immunities argument. To uphold their claims would effectively nullify the recent *White* decision — which would lose all meaning less than one year after being delivered.

The opinion in *White* itself precludes such nullification. In the course of upholding the Boston Order, the *White* Court specifically discussed the circumstances under which such an economic regulation would violate the Privileges and Immunities Clause. It said a violation would exist if the regulation "is an attempt to force virtually all businesses that benefit in some way from the economic ripple effect" of the city decision to grant a hiring preference to city residents. 103 S.Ct. at 1046, *quoting Hicklin v. Orbeck, supra*, 437 U.S. at 531. Such an uncabined regulation would extend to employees who "have no connection whatsoever with the City's economic project," and would "not [be] limited to activities connected with" the city project. *White v. Mass. Council of Construction Employers, supra*, 103 S.Ct. at 1046.

The Boston Order was permissible under the announced standards. The Order was not an effort to impose a resident-hiring requirement upon all who "benefit in some way from the economic ripple effect" of Boston's projects. Rather, it only "cover[ed] a discrete identifiable class of economic activities in which the city is a major participant." *Id.* at 1046 n. 7.

The identical situation obtains in Camden. The city is not seeking to regulate all who benefit from an economic ripple effect. Rather, it is affecting only those who directly work on projects funded by the city. It has covered only a "discrete identifiable class of economic activity in which the city is a major participant." As well, "[e]veryone affected by the [ordinance] is in a substantial . . . sense . . . working for the city."[34] *Ibid.*

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34. As in *White*, this includes subcontractors working on city-funded projects. *See* 103 S.Ct. at 1046 n.7.

B. The Camden Ordinance Is A Reasonable And Constitutionally Permissible Local Effort To Secure Jobs For City Residents on City-Funded Projects, While Allowing Non-City Residents To Obtain Over One-Half The Jobs On These Projects.

Apart from the fact that the *White* decision validates the ordinance, Camden's law is a constitutionally permissible means of responding to dramatic problems faced by the city. The law represents a reasonable effort to secure a degree of employment for city residents on city-funded projects, while simultaneously permitting non-city residents to obtain more than half the jobs on these projects.[35]

A reasonable law aiding the employment of city residents is essential because of the drastic unemployment and business situation in Camden. The City Council thus enacted an ordinance in an area where the city has plenary authority and control—the expenditure of the city's own funds for construction.[36] In making its own expenditures, of course, the city can determine who shall receive its monies. This right is possessed by any party, and is augmented by the city's role " 'as guardian and trustee for its people' " and by the "the 'long recognized right of [a] trader' . . . to exercise his own independent discretion as to parties with whom he will deal" when spending his funds in the market. *White v. Mass. Council of Construction Employers, Inc., supra.* 103 S.Ct. at 1044 n. 3.

Camden's right to enact its ordinance is further confirmed because the city acted in harmony with decisions of Congress

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35. The reasonableness of the city's ordinance is the more pronounced because, based on the decision in *White*, the city could require good faith efforts to employ Camden residents for *all* construction jobs on projects funded by the city. This could be done because the city would still be acting as a market participant rather than a market regulator; and would only be affecting those who are in a substantial sense working for the city itself, rather than affecting all who benefit in some way from the economic ripple effect of city-funded projects.

36. This Court has long recognized the legitimacy and significance of local efforts to respond to local concerns, particularly with regard to the expenditure of local revenues. See e.g. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 41, 49-50 (1973).

and this Court. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court upheld a federal statute which provided funds for public works and directed that a percentage of the monies should be set aside for minority-owned businesses. Chief Justice Burger stated that the statute in question had the overall objective of channeling "funds into areas of high unemployment," and had also been intended "to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with Government procurement programs, could not be expected to benefit significantly from the public works program as then formulated." 448 U.S. at 459.

The Chief Justice pointed out that "Congress had abundant evidence" that minorities had been excluded by "racial and ethnic discrimination" from participation on state and local construction projects. *Id.* at 477, 478. He cited congressional statements that the percentage of minority group members benefitting from governmental procurement for construction was far less than their percentage of the population, and he said Congress had ample data from which to conclude the discrimination against minorities in the construction industry would be perpetuated in the absence of the remedial legislation under review. *Ibid.*

The Camden ordinance as a whole, and the residency provision in particular, were enacted for the same purposes and to address the same problems as the statute upheld in *Fullilove*. The ordinance directs public money into an area of high unemployment, and seeks to promote "equality of economic opportunity" for minorities. The residency clause furthers these goals. By providing that good faith efforts should be made to fill 40 percent of the affected jobs with city residents, the clause provides for expenditures of city money to address the problem of severe unemployment. As well, by providing that affected jobs should be filled with residents in a city where minorities comprise over 70 percent of the population and have a gravely high rate of unemployment, the ordinance seeks to help remedy the

discrimination historically practiced against minorities in the construction industry.[37]

C. Appellant's Privileges And Immunities Arguments Are Invalid.

Although the Camden ordinance is a reasonable effort to secure for city residents a portion of jobs available on city-funded construction projects, while permitting non-residents to obtain over half the jobs, appellant assails the ordinance as a violation of non-residents' rights under the Privileges and Immunities Clause. Appellant seeks a decision that would handcuff local governments by preventing them from enacting a reasonable response to gravely pressing local needs. It would have the Court ignore the precept that, in determining whether there has been a violation of the Privileges and Immunities Clause, "[t]he inquiry must . . . be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

Appellant makes several arguments in support of its claim that the residency provision of the ordinance violates the Privileges and Immunities Clause. None of the arguments is valid.

1. Appellant asserts the Clause is violated because unemployment is a "national problem." Thus, it says, Camden's effort to combat very high unemployment within its own boundaries is "parochial." That unemployment exists elsewhere than in Camden, however, does not mean Camden's efforts to alleviate the problem are narrowmindedly "parochial." Nor does it mean Camden is constitutionally disqualified from seeking to alleviate

37. The parallel between this case and *Fullilove* is even the more striking because some of the monies controlled and expended by Camden were granted to it under federal statutes which, like the statute in *Fullilove*, "were intended to encourage economic revitalization, including improved opportunities for the poor, minorities, and unemployed." *White v. Mass. Council of Construction Employers, Inc., supra*, 103 S.Ct. at 1047. Furthermore, because the federal statutes under which Camden received monies are two of the same laws as were discussed in the *White* case, and the Camden ordinance is virtually identical to the Order in *White*, it is as true here as in *White* that the law at issue "sounds a harmonious note" with federal policy. *Ibid.*

its own local unemployment situation by determining that a portion of its own funds should go to its own residents. To the contrary, Camden is entitled to direct its money to local citizens for the purpose of curing dramatic local ills.[38]

Not to be overlooked in this regard is that Camden is acting in harmony with programs and principles of Congress and this Court. As said before, Congress itself has enacted laws to help alleviate general and minority unemployment, and this Court has approved such programs. Camden's ordinance provides a necessary local supplement in a geographical area where Congress' programs have had an inadequate impact.

Furthermore, in enacting its ordinance, Camden was not only supplementing the laws of Congress but, independently of this, was "serv[ing] as [a] laborator[y] for the development of new social, economic, and political ideas" for solving major problems. *Federal Energy Regulatory Comm. v. Miss.*, ____ U.S. ____, 102 S.Ct. 2126, 2152 (1982) (O'Connor, J., dissenting). Justice O'Connor has recently pointed out that this "laboratory" concept of "State innovation is no judicial myth." *Ibid.* Here, Camden has promulgated a reasonable law which has had a favorable impact upon a problem that is distinctly local as well as national, and which has had such impact while preserving jobs for non-city residents. If the Brandeisian concept of the states as laboratories[39] is to have any meaning, Camden's ordinance must be upheld.

2. Appellant also claims the ordinance violates the Privileges and Immunities Clause because parties located outside of Camden are not the "peculiar source of the evil" addressed by the ordinance, and because the law is not substantially related to alleviating the evil. Appellant's arguments are simply wrong in

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38. Appellant's argument creates a curious anomaly in this regard. Appellant probably would not object to Camden giving all of its welfare money to city residents. Yet, it objects when the city directs only some of its construction money to these residents. The anomaly is the more striking because this use of construction money helps alleviate the welfare problem.

39. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

fact and, had there been a trial, Camden would have shown this.

The high rate of unemployment in Camden is due to employed individuals and businesses having left the city in large numbers. This flight left behind a reduced population with a high percentage of unemployed, as well as a vastly diminished number of job opportunities. Moreover, prior to the ordinance, jobs on city construction projects were mainly filled by non-city residents.[40] For these reasons, parties now outside the city *are* the source of the evil besetting it — they are a major cause of its high rate of general unemployment and of unemployment in its construction industry in particular.

As well, the ordinance directly addresses the "evil" and, as a provable fact, has had an impact upon it. The evil is addressed by requiring good faith efforts to hire city residents, and the ordinance has had the practical effect of causing an increase in the number of such residents working on city-funded construction projects.

Nor is it factually true, as appellant hypothetically contends to be possible, that the ordinance has merely led to the hiring of previously employed city residents rather than previously unemployed ones. Rather, the law has resulted in employment for city residents who lacked work.[41] Appellant's academic argument to the contrary is without practical reality.

3. Overlooking the fact that the Camden ordinance permits non-residents to secure 60 percent of the jobs created by Camden's own money, appellant argues hypothetically that the law nonetheless must fall because it assertedly excludes members of its constituent unions from 40 percent of the jobs Camden itself has created. However, as said earlier, the law has not in fact caused any non-city resident to lose a job he otherwise would have obtained. Nor has appellant offered any proof of any

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40. Over 70 percent of Camden's population belongs to minority groups and, as has been recognized by Congress, there has been extensive discrimination against minorities in the construction industry.

41. This is not surprising, in view of Camden's predominant minority population and these citizens' gravely high rate of unemployment.

such loss.[42] Thus, appellant's argument is unfounded and unproven. The alleged "exclusion" has not in fact excluded and appellant has not shown the contrary.[43] "[P]utting aside theoretical [arguments] and looking to the practical effects" of the ordinance, it has neither fenced out nor injured the appellant or members of its constituent unions. *Austin v. New Hampshire*, 420 U.S. 656, 664 (1974).[44]

4. Appellant conjectures that the Camden ordinance will lead to the enactment of retaliatory laws by other jurisdictions. Once again, however, there is utterly no proof that any other jurisdiction has or will enact an ordinance in retaliation. Like many of its other arguments, appellant's speculative claim is insufficient to deprive Camden of the right to enact an ordinance necessary to ameliorate a dramatic problem that is concrete rather than merely speculative.[45]

5. Appellant argues the Camden ordinance gives an unlawful preference to New Jersey residents. Thus, it says, the ordinance violates the principle that state citizenship cannot be the basis for discrimination, i.e., the principle that a citizen of State A must receive in State B the same privileges which accrue to

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42. Rather than offer proof of any type, of course, appellant chose to assail the law under a procedure lacking a trial-type hearing.

43. Even if the law *had* caused non-city residents to lose some jobs they otherwise would have obtained, however, the ordinance would still be permissible for numerous reasons detailed in this brief, e.g., it would still be a reasonable and valid means of securing jobs for city residents on city-funded projects, while allowing non-residents to obtain more than half the jobs on those projects.

44. Camden has no desire to exclude or fence out appellant or members of its constituent unions. Rather than being intended to exclude such parties, the ordinance is only intended to help assure that qualified city residents also have a fair opportunity for employment. If qualified city residents were unavailable despite good faith efforts to find them, a contractor could hire 100 percent non-residents.

45. Moreover, even if other jurisdictions did enact similar ordinances, such laws might, like Camden's, be for the purpose of ameliorating a serious local problem rather than being intended to retaliate. As well, the laws, again like Camden's, might not exclude citizens of other jurisdictions, but could instead leave extensive room for them to participate on locally-funded projects.

the latter's citizens by virtue of their state citizenship. *Toomer v. Witsell*, *supra*, 334 U.S. at 395.

Camden's ordinance does not run afoul of this principle. Even if the ordinance gives a preference to Camden citizens, this preference does not arise by virtue of *New Jersey* citizenship, but because of *Camden* citizenship. Being a citizen of the state entitles *no one* to the preference, and New Jersey residents living outside of Camden do not receive it. Indeed, as the New Jersey Supreme Court pointed out, more non-Camden, *New Jersey* residents are affected than out of state residents.[46] Thus, there is no preference for New Jersey residents qua New Jersey residents, and there is no discrimination against out of state residents.

Moreover, as a practical matter, the asserted preference for Camden residents has not disadvantaged citizens of *any* area, whether they be residents of New Jersey living outside Camden or residents of a different state. As said before, there has been no showing by appellant that the ordinance has caused any non-Camden resident to lose a job he otherwise would have obtained, and the city asserts there has in fact been no such loss of jobs.[47] For this reason, too, there has been no denial to any non-New Jersey resident of a privilege accruing to New Jersey citizens.[48]

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46. A26.

47. As said before, as in *White* there is no showing that "the increased employment of city residents in publicly-funded construction projects has been accompanied by a decline in the percentage of out-of-state residents." 103 S.Ct. at 1045 n. 6.

48. *Amicus* New England Legal Foundation makes arguments additional to those raised by appellant. It asserts that Camden's law harms Camden and its citizens because the law will "unavoidab[ly]" result in the "employment of inexperienced and less qualified employees", and will result "in higher costs of public construction." *Amicus* is in effect arguing that city residents who have been kept out of construction employment because of discrimination should continue to be kept out because this will be better for Camden — which has itself decided to the contrary. The City totally disagrees with *amicus*' characterization of qualifications, costs, and economic benefits.

6. Finally, appellant claims that because the state assertedly could not enact the law passed by Camden, the city cannot do so either. But the state *could* enact the law passed by Camden (and has in fact approved it). New Jersey could promulgate a law providing for good faith efforts to hire city residents for 40 percent of the jobs on city-funded projects in a city that has experienced the high unemployment, loss of businesses, and decline in population experienced by Camden. All the reasons which support such a law when enacted by Camden would also support it if enacted by the state.[49]

III. THE CAMDEN ORDINANCE IS VALID UNDER THE EQUAL PROTECTION CLAUSE.

In its brief, appellant has argued that the Camden ordinance violates the Equal Protection Clause. Its argument, however, is directed at the former provision under which a resident of Camden was defined as a person who had lived in Camden for 12 months. In other words, its argument is directed at the durational requirement which no longer exists. Under the amended ordinance, a resident is any person who resides in Camden, no matter how brief the period of residence has been.

Appellant's argument on the durational requirement is thus moot. Nor can there be any successful attack on the ordinance as amended. Bona fide residency requirements have been continually upheld by the Court in regard to public employment, schooling, and other matters. *See e.g. McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976) (upholding a bona fide resident requirement for municipal employment); *Martinez v. Bynum*, ____ U.S. ____, 51 U.S.L.W. 4524 (1983) (upholding a bona fide resident requirement for tuition free public schooling).

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49. Not at issue here is whether a state could enact a law giving a 100 percent hiring preference to state residents everywhere in the jurisdiction, and doing so regardless of differences in economic conditions in different parts of the state. The only question properly under discussion here is whether a state could pass a law providing that city residents shall have a partial preference in a particular urban area facing dramatic problems such as Camden's.

A bona fide residency provision such as Camden's does not burden any right of travel.[50] This is particularly true because the Camden law does not prohibit or in any way deter an individual from traveling to Camden for the purpose of establishing residency there. (Indeed, Camden welcomes such migration.) Nor is there any fundamental right to employment on projects funded by the city. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1975). Nor is any suspect classification involved. For these reasons, the Camden law must be upheld if it is a rational means of addressing a problem. *Ibid*. As shown earlier, the law is, in fact, a highly rational means of alleviating severe economic ills.

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50. In *McCarthy, supra*, the Court ruled that the right o. vel is not burdened by a residency requirement for city employees. The situation is no different when the requirement applies to city-funded projects on which "[e]veryone affected . . . is in a substantial . . . sense . . . 'working for the city.'" *White v. Mass. Council of Construction Employers, Inc., supra*, 103 S. Ct. at 1046 n.7.

CONCLUSION

For the foregoing reasons, Appellees, Mayor and Council of the City of Camden, respectfully request this Court to affirm the judgment of the New Jersey Supreme Court upholding the validity of the City of Camden's Affirmative Action Ordinance.

Respectfully submitted,

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APPENDIX

ORDINANCE AMENDING AN ORDINANCE ENTITLED, "AN ORDINANCE TO ESTABLISH AN AFFIRMATIVE ACTION PROGRAM IN CONNECTION WITH CONSTRUCTION CONTRACTS TO BE PERFORMED FOR OR ON BEHALF OF THE CITY OF CAMDEN" — MC-1650, AS AMENDED AND SUPPLEMENTED

WHEREAS, on August 14, 1980, the Council of the City of Camden adopted an Affirmative Action Program in connection with construction contracts to be performed for or on behalf of the City of Camden; and

WHEREAS, this program was amended by ordinance on September 11, 1980; and

WHEREAS, the following findings were made by the Council of the City of Camden:

1. The City Council of the City of Camden recognizes its legal and moral obligation to promote and preserve the economic well-being of all citizens of the City of Camden; and

2. The City Council of the City of Camden, in viewing the present economic conditions which confront minority citizens within the City of Camden, and said minority citizens make up a significant portion of the population of the City of Camden; and

3. The present economic conditions nation-wide do affect, in an adverse fashion, the economic well-being and status of minority citizens of the City of Camden in such a way as to elevate the amount of unemployment within the City of Camden above the levels that exist County-wide and State-wide; and

4. The City Council of the City of Camden has been informed that unemployment State-wide is 8.1% and County-wide is 7.6%. The unemployment figures for the City of Camden, as given to the City Council by the Department of Labor of the United States, are 11.5%. However, at the last figures recorded by the State of New Jersey Department of Labor Affirmative Action Office, unemployment among Black Americans was

18.4% and unemployment among Hispanic-Americans was 15.6%. The latter figures as to Black and Hispanic unemployment were as of the end of 1977 and the Department of Labor has informed the City Council of the City of Camden that these particular figures have increased significantly making the problem of unemployment even more grave than that which existed when the figures were compiled; and

5. The City Council of the City of Camden, by the adoption of an Affirmative Action Program, seeks to relieve the problem of unemployment among its residents and citizens and seeks to promote the growth of minority involvement in construction and obtaining contracts for minority-owned businesses; and

6. The City of Camden, in concert with the State of New Jersey and the Federal Government, supports the concept of seeking to grant a definite portion of all construction trade-related contracts and jobs, funded by local, state and/or federal monies, to minority contractors and employees; and

WHEREAS, the current unemployment figure for the City of Camden as reported by the New Jersey Department of Labor is 19.1%; and

WHEREAS, it is necessary to amend the ordinance to promote more efficient and effective implementation of the Affirmative Action Program in connection with construction contracts to be performed for or on behalf of the City of Camden, as amended and supplemented; now, therefore

BE IT ORDAINED, by the Council of the City of Camden that:

SECTION 1. Ordinance MC-1650, adopted August 14, 1980, as amended and supplemented, shall be further amended and supplemented by the amendments attached hereto and incorporated into this ordinance by reference, set forth in separate from covenience, understandability and economy.

SECTION 2. This amendment shall not be interpreted as a waiver of any requirements on any contract or project that is currently subject to the provisions of MC-1650 as amended and supplemented.

SECTION 3. All ordinance or parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed.

SECTION 4. Any ordinance not amended or supplemented herein is saved from repeal and shall remain in full force and effect.

SECTION 5. This ordinance shall take effect 20 days after final passage and publication as required by law.

Dated: June 9, 1983

The above has been reviewed
and approved as to form:

City Attorney

President, City Council

Mayor

AFFIRMATIVE ACTION ORDINANCE

Section 1. *Definitions*

1.1 For the purpose of this ordinance, unless the context clearly dictates otherwise, the following terms shall have the following meanings:

Advanced Trainee — a worker who is classified by a party acceptable to the N.J. Department of Treasury, Affirmative Action Office as having experience and skills used in a particular craft or occupation, but lacking the skills to be qualified as a journeyworker.

Apprentice — A worker who is a trainee and individually registered in a bona fide apprenticeship program with the U. S. Department of Labor Manpower Administration, Bureau of Apprenticeship and Training with a State Apprenticeship Program.

Construction Contract — Any agreement for the erection, repair or alteration of any building structure, bridge, roadway or other improvement to real property which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant.

Developer/contractor — any party performing or offering to perform a "construction contract".

Journeyworker — a worker who has been certified by a party acceptable to the N.J. Department of the Treasury Affirmative Action Office as having mastered a craft or trade.

Minority — includes persons who are either Black, Hispanic, Asian, Native American, or women, as those terms are defined herein:

Black: all persons having origins in any of the Black racial groups of Africa.

Hispanic: all persons of Mexican, Puerto Rican, Cuban, Central or South American origin, regardless of race.

Native American: all persons having their origin in any of the original peoples of North America.

Asian: all persons having their origin in any of the original peoples of the Far East, Southeast Asia, Indian subcontinent, or Pacific Islands.

Minority-owned business — any business enterprise in which more than half of the beneficial interest in such business enterprise is held by individuals who are members of a minority and of which more than half the net profits or losses are attributable to the efforts of an are distributed to members of a minority and which is certified by the Affirmative Action Review Council as such. For the purpose of qualifying as a minority-owned business, the contractor may be required to submit additional information to the Affirmative Action Review Council.

Construction site — the geographical location where the erection, repair or alteration described in the construction contract is performed.

Resident of the City of Camden — any person who resides in the City of Camden.

Subcontractor — a third party that is engaged by the Developer/Contractor to perform all or part of the work included in the construction contract.

Trainee — a worker who is not eligible for an apprentice program and is certified as having no previous experience and skills used in a particular craft or occupation, but has demonstrated an interest in acquiring same and agreed to enter into an approved on-site and off-site training program.

Section 2. *Affirmative Action Review Council*

2.1. There is hereby established an Affirmative Action Review Council of the City of Camden with the powers and duties hereinafter provided.

2.2. *Membership*

A. The Affirmative Action Review Council shall consist of seven (7) members. Initially the composition of the Affirmative Action Review Council shall consist of four (4) members who shall be appointed for a term of two (2) years and three (3) members who shall be appointed for a period of one (1) year; thereafter, all members of such Council shall be appointed for a term of two (2) years.

B. Members of the Affirmative Action Review Council shall be appointed by the Mayor with the advice and consent of City Council. The Mayor shall make every effort to include as part of the Affirmative Action Review Council representation from organized labor, contractors' associations, government and the minority community. The Mayor and City Council shall appoint individuals to the Affirmative Action Review Council who are committed to the letter and spirit of this ordinance and the purpose and principles which it seeks to advance.

C. Members of the Affirmative Action Review Council may be removed for non-performance or neglect of duties or for other good cause by the Mayor with the concurrence of the majority of City Council.

D. Members of the Affirmative Action Review Council shall serve without compensation.

E. Vacancies in the Affirmative Action Review Council, for whatever reason, shall be filled in the manner herein provided for new appointments.

2.3. *Powers and Duties*

The powers and duties of the Affirmative Action Review Council shall included the following:

A. Adopting of rules and procedures for the regulation and conduct of its meetings.

B. Evaluating the initial workforce report and other relevant information submitted by the developer/contractor who is the apparent low bidder and the known principal sub-contractors in order to determine the adequacy of the developer/contractor's plan to attain the hiring goals established in Section 4.1 and the minority business enterprise goal established in Section 5.1.

C. Making recommendations to Camden City Council regarding the award of contracts that are subject to the provisions of this ordinance.

D. Reviewing any contracts awarded that are subject to the goals enumerated in Section 5.2 and 5.3 and making recommendations to the Department of Administration and, where appropriate, to Camden City Council.

E. Monitoring and enforcing the affirmative action performance of contractors subject to the provisions of this ordinance.

F. Supplying information to all minority organizations who request information regarding minority participation in proposed projects.

G. Establishing and improving formats for reports, schedules and such other documentation that may be reasonably required to implement this ordinance.

Section 3. *Contract Compliance Officer*

3.1. *Powers and Duties*

In addition to any other powers and duties that may be assigned to the contract compliance officer by law, ordinance, regulation or administrative directive, the Contract Compliance Officer of the Contract Compliance Unit of the Office of the City Attorney of the City of Camden shall also:

A. Act as Liaison between the Affirmative Action Review Council and the Contract Compliance Unit of the City of Camden.

B. Gather all information necessary for the Affirmative Action Review Council to make a determination of the adequacy of an apparent low bidder's plan to attain the goals established in this ordinance.

C. Monitor the affirmative action performance of persons subject to the provisions of this ordinance.

D. Report to the Affirmative Action Review Council a contractor/developer's performance with respect to the provisions of this ordinance and recommend to the Affirmative Action Review Council such action that may be proper to correct non-compliance with this ordinance.

E. Issue "Alert Notices" and "Violation Notices" for Contractor's failure to comply with workforce commitments under this ordinance.

F. Provide information and referrals to the City of Camden, Bureau of Purchasing regarding Minority Business Enterprises as well as monitoring the City's compliance with Section 5.2 and 5.3 of this ordinance.

G. At the request of the Affirmative Action Review Council, perform other tasks reasonably necessary to facilitate the functions of the Affirmative Action Review Council and to facilitate the implementation of this ordinance.

Section 4. *Construction Contract Hiring Goals*

4.1 For any "construction contract" in excess of $50,000.00, there are hereby established the following goals for employment at the construction site:

A. 25% of the work hours shall be furnished by minority workers.

B. 40% of the work hours shall be furnished by City residents.

4.2. To the extent practicable, the goals set forth in paragraph 4.1 shall apply to each and every trade, craft or skill employed to perform the construction contract and shall be reflected throughout the various levels of employment within each trade, craft or skill; however, in no event shall the total work hours furnished by minority workers and City residents be less than the goals established in paragraph 4.1.

4.3 In determining the total work hours to be furnished at the construction site, there shall be included the number of hours devoted to all tasks customarily performed on a construction site whether or not such tasks are, in fact, performed on the construction site.

Section 5. *Minority Business Enterprise Goals*

5.1. The developer/contractor shall assure that 25% of the dollar cost of any construction contract exceeding $50,000.00 shall be awarded to minority business enterprises as defined in this ordinance and as certified as such by the Review Council.

5.2. To the extent permissible under the provisions of the New Jersey Public Contracts Law, the City of Camden shall ensure that a fair and substantial portion of those publicly funded City construction contracts valued at less than $50,000.00, but in excess of $4,500.00, are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 35% of the total dollar amount of such contracts awarded annually.

5.3. To the extent permissible under the provisions of the New Jersey Public Contracts Law, the City of Camden shall ensure that a fair and substantial portion of publicly funded service and purchase contracts, valued at less than $4,500.00 are awarded to minority-owned business enterprises. For the purpose of this section, a fair and substantial portion shall be considered to be not less than 50% of the total dollar amount of such contracts awarded annually.

Section 6. *Developer-Contractor's Contracting Obligation*

6.1. A developer/contractor to whom Sections 4 and 5.1 are applicable, shall submit copies of this ordinance to all subcontractors and shall make compliance with it, a specification of all bids. The developer/contractor shall provide in any request for bids by a subcontractor that the subcontractor's submission of a bid shall institute his/her agreement that he/she will comply with the requirements of this ordinance.

6.2 The developer/contractor when hiring for jobs and selecting minority business enterprises shall make a good faith

effort to insure that the goals set forth in Sections 4 and 5 of this ordinance shall be met. In the event that a developer/contractor shall fail to meet the goals set forth in Sections 4 and 5 of this ordinance, the Affirmative Action Review Council shall determine whether or not the developer/contractor has in fact made a good faith effort at compliance. This determination by the Affirmative Action Review Council shall be made in accordance with the criteria set forth in Section 9, paragraphs 9.2 and 9.3 of this ordinance.

6.3 The developer/contractor shall ensure that any sub-contractor working on any part of the project under a subcontract exceeding $25,000.00 and involving in excess of eighty (80) worker hours, shall employ minority apprentices in each trade to work such total hours that shall equal at least 10% of the hours worked by the journeyworkers employed in the same trade.

6.4 It is not the intent of this ordinance to alter any collective bargaining agreements between the developer/contractor and his sub-contractors and their various unions provided, however, the existence of a term and condition in such an agreement which by its terms precludes compliance with the terms of this ordinance shall not excuse a person from his duty to comply with this ordinance.

6.5. Each developer/contractor or sub-contractor will notify the Camden Contract Compliance Officer whenever he/she has reason to believe that any union which has a hiring hall or referral arrangement or an apprenticeship program engages in such referral, membership, admission or other practices as will substantially impede the contractor in his/her efforts to meet the Affirmative Action obligations under this ordinance.

6.6. The developer/contractor shall submit copies of the collective bargaining agreement covering workers to be employed on the project, and copies of such bargaining agreements of each sub-contractor.

6.7. The developer/contractor shall designate a principal officer of its firm to be responsible for administering the Affirmative Action Program detailed herein. This officer shall meet regularly, or as may be required, with the Contract Compliance Officer for Camden and/or the Review Council to ensure attainment of the goals set forth herein and the implementation of the training program. Included in this obligation is the requirement that each developer/contractor and sub-contractor keep and maintain records for all trainees so that separate payroll amounts and descriptions of payments, training progress, together with all benefits, are recorded separately.

Section 7. *Pre-award Conference*

After bids are received for a particular construction contract subject to the provisions of Section 4 and Section 5.1, and prior to award of such a contract by Camden City Council, the apparent low bidder and the known principal sub-contractors, will be required to attend a pre-award conference with the Contract Compliance Officer. The purpose of the Pre-award Conference will be to evaluate the developer/contractor's Affirmative Action plan or plans to comply with the provisions of this ordinance and its past performance with respect to Affirmative Action.

The evaluation shall focus on the developer/contractor's commitments to:

a. Cooperate with the unions with which the contractor has agreements in the development of programs to assure qualified members of minority groups of equal opportunity in employment in the construction trades.

b. Improve opportunities for the upgrading of the job titles of the minority group members of the construction force.

c. Actively seek union membership for qualified minority members of the construction force.

d. Make certain that all recruiting activities are carried out on a non-discriminatory basis.

e. Make known to all of the sub-contractors, employees and sources of referral, its equal employment opportunity policy.

f. Encourage minority group sub-contractors to bid for sub-contracting work.

g. Demonstrate how minimum requirements and goals, as set forth in the within ordinance, will be met.

Section 8. *Reporting Requirements and Contract Monitoring*

For all contracts subject to Section 4 and Section 5.1 the following requirements will apply.

8.1. The contractor and each sub-contractor whose contract(s) exceeds $25,000.00, shall complete and submit a Work Force Table. This document shall identify the estimated workforce requirements for the duration of the job, broken down by trade and month. This document shall be revised as required, but not less than once a month. A developer/contractor's failure to provide this document or its furnishing substantially false or misleading information in this document shall be considered non-compliance with the terms of this ordinance.

8.2. The developer/contractor must submit to the Contract Compliance Officer the developer/contractor's weekly payroll records for all crafts covered under the contract provisions. In addition, a monthly cumulative summary of project workforce must be provided on a craft-by-craft basis and the individuals comprising the workforce must be identified as to their minority or non-minority status and residence.

8.3. The developer/contractor shall, on the last working day of each month, submit to the Contract Compliance Officer, a written narrative describing its efforts to ensure compliance with this ordinance. The report will include an ap-

praisal as to the effectiveness of the developer/contractor's program and will specify those factors and conditions which impede, restrict or account for less than complete success of the program.

8.4. The developer/contractor shall permit access to weekly certified payroll records for all employees covered under the contract.

8.5. The developer/contractor shall continually monitor personnel activities to ensure that the provisions of this ordinance and the developer/contractor's Affirmative Action plans are being met.

Section 9. *Criteria for Measuring Good Faith*

9.1. In the event of failure by a developer/contractor to meet the minority and City resident workforce requirements and the Minority Business Enterprise requirements set forth in Section 4 and Section 5 of this ordinance, the developer/contractor shall be given an opportunity to demonstrate that every good faith effort has been made to meet these requirements. In any proceeding in which such good faith is an issue, all of the actions of the developer/contractor, in seeking to comply with these requirements, shall be reviewed and evaluated by the Affirmative Action Review Council in light of the criteria set forth below. Compliance with these conditions shall be monitored by the Contract Compliance Officer.

9.2. A developer/contractor's good faith efforts with regard to minority and City resident workforce requirements shall be measured by:

a. The developer/contractor's efforts to actively solicit City residents and minorities as members of the workforce to be employed in connection with the construction contract and to solicit sub-contractors employing City residents and minorities.

b. The developer/contractor's efforts to notify the Affirmative Action Review Council of opportunities for minority and City resident participation in proposed projects. The Affirmative Action Review Council shall place notifications in area publications, including minority publications, and shall also notify non-profit minority organizations regarding such employment opportunities.

c. The consideration given by the developer/contractor for employment as journeymen, trainees, advanced trainees and apprentices to persons referred by any training source approved by the Review Council.

d. Size of developer/contractor's workforce. A contractor shall not be deemed to have exercised good faith under this agreement solely because of union opposition, even if the unions threaten a work stoppage because of the implementation of this plan. It shall be incumbent upon the developer/contractor, as an employer, to see to it that referrals under this plan are treated fairly by the unions and their members.

9.3. Good faith efforts with regard to Minority-owned Business Enterprise participation shall be measured by contractor's efforts to:

a. Inform associations, groups and organizations of bid specifications within a reasonable time of the closing date for bid submission.

b. Actively recruit minority business enterprises to bid on sub-contracts.

c. Limit the size and dollar volume of sub-contracts to the extent feasible and to otherwise arrange solicitations and completion dates in order to make it possible for minority business enterprises to bid and compete for said contracts.

d. Upon receipt of a statement from a minority business enterprise, supported by an affidavit, that such enterprise is unable to obtain requisite bonding or insur-

ance through normal channels, assume the responsibility for meeting such requirements or otherwise making appropriate arrangements which shall eliminate these requirements as obstacles to the granting of the sub-contract to such minority business enterprise.

e. Notify the Affirmative Action Review Council of outstanding subcontracting needs and consider for subcontracting purposes minority-owned business referred by the Affirmative Action Review Council. If the contractor does not use the sub-contractors so referred, it shall submit a written explanation to the Affirmative Action Review Council within three business days of the reference.

f. Solicit minority participation through advertising in area publications, including minority publications.

g. Inform area non-profit minority organizations of opportunities.

h. Provide whatever other counseling or assistance as may be necessary during the preparatory stages and the actual performance of such sub-contracts.

i. Offer to assist minority business enterprises in entering into joint ventures with others for the purpose of accomplishing a total sub-contract, if they so desire.

j. Document the above.

Section 10. *Non-compliance*

10.1. In the event of developer/contractor's failure to meet the requirements of this ordinance, the Contract Compliance Officer shall take the following steps:

a. Issue a written "Alert Notice" to a developer/contractor and to appropriate unions whenever, in his or her opinion, the developer/contractor is not in compliance with the provisions of this ordinance or the rules and regulations issued pursuant thereto.

b. If the Alert Notice is not removed within three (3) working days by a correction of the deficiencies, the Contract Compliance Officer shall follow up the Alert Notice by issuing a written "Violation Notice". Upon

the issuance of such notice, the developer/contractor will have seven (7) working days to correct the violation. If the violation has not been corrected within that period the Contract Compliance Officer will make recommendations to the Review Council of action to be taken by the City of Camden.

10.2. Either or both notices described above may be removed by the Contract Compliance Officer if the developer/contractor meets its obligations under this ordinance or if it presents a satisfactory explanation, in writing, as to why such compliance is impractical or impossible provided, however, such action by the Contract Compliance Officer shall be subject to the review of the Affirmative Action Review Council.

10.3. In the event that the requirements of this ordinance have not been met by a developer/contractor and it is determined by the Affirmative Action Review Council that a "good faith effort" has not been made, the Affirmative Action Review Council shall recommend to the Business Administrator and the particular department acting as the funding source, one or more of the following actions:

a. Hold a meeting of all parties to attempt an amicable resolution of the determination of non-compliance by the Affirmative Action Review Council.
b. Require the developer/contractor to comply with the terms of this ordinance through the appropriate legal action.
c. Withhold payments under any contract or grant which may be due or owing to any developer/contractor.
d. Require the developer/contractor to enforce his obligations under his contract with contractors and sub-contractors by litigation at law or in equity, whichever is appropriate.
e. Recommend termination or suspension of the contracts in whole or in part to the City Council.
f. Take all other actions available at law or in equity for the breach of this agreement an act of irresponsibility

by the contractor which the City may take into account in evaluating future bids by that contractor within the parameters of the local Public Contract Law of the State of New Jersey, *N.J.S.A.* 40A:11-1, *et seq*.

h. Notify the Affirmative Action Officer of the State of New Jersey of the developer/contractor's non-compliance.

10.4. The use of any or all of the above remedies shall rest within the discretion of the Business Administrator with the advice of any and all department heads which he or she deems fit. Failure to so act shall not be considered as a waiver of any provision or right contained within this ordinance.

Section ~~11~~. *Union Statements*

When a developer/contractor has a referral agreement or arrangement with a union covering workers to be employed on a project to which this ordinance applies, such developer/contractor shall submit with its bid a statement signed by an authorized union official, in which the union agrees as follows:

a. Said union is aware of the terms, conditions and goals of the within ordinance.

b. Said union shall make a good faith attempt to assist the developer/contractor and/or sub-contractor, as the case may be, to comply with the terms, conditions and goals set forth within this ordinance. A sub-contractor will promptly notify the developer/contractor and the Affirmative Action Review Council of any failure on the part of a union to comply with the provisions of the above described statement. If a union has refused to sign the statement described above, the developer/contractor will document his/her efforts to obtain such statement, including a description with the reasons given by the union for not signing such statement, and submit such documentation, together with his/her bid. A bid shall be deemed unresponsive if un-

accompanied either by an acceptable union statement or by documentation as to why such a statement could not be obtained. In addition, the award of a contract or sub-contract will not be approved if such contractor has not submitted an acceptable union statement, or an explanation of the failure to obtain a statement. The failure of the union to sign the statement described above does not excuse the developer/contractor from his/her obligation to comply with the conditions and provisions of this ordinance.

Section 12. *Sub-contractors*

12.1. Each developer/contractor shall be responsible for the performance of its sub-contractors in the implementation of the provisions of this ordinance during the performance of the contract. Whenever a developer/contractor sub-contracts a portion of the work on a project, the sub-contract shall bind the sub-contractor to the obligations contained in this ordinance to the full extent as if he/she were the developer/contractor. Furthermore, the developer/contractor must include a provision in all contracts with sub-contractors to ensure compliance with all other conditions included herein, as well as with the New Jersey Executive Order 21 and *N.J.S.A.* 10:2-1 through *N.J.S.A.* 10:2-4, the President's Executive Order No. 11246 (C.F.R. 12319-25), *N.J.S.A.* 10:5-31, *et seq.* and Chapter 127 of Public Laws of 1975.

Section 13. *Governmental Requirements*

13.1. All developer/contractors shall comply with any and all applicable federal or state requirements for equal opportunity, but compliance with the same shall, in no way, excuse any non-compliance with any specific requirements as set forth in the within ordinance.

13.2. All advertisement and solicitation of construction contract bids must contain the following language: "Bidders are required to comply with P.L. 1975, C.127."

Section 14. ***Outreach and Training***

On construction contracts of 2.5 million dollars or more, the City must set aside ½ of one percent of the total project cost to be used for outreach and training of minorities and females, if necessary, for the contractor to meet the hiring goals.